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SEP 9 1966
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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 441

SANDOR SCHWARTZ,

Petitioner,

against

CYRUS S. EATON, WALTER J. TUOHY, CYRUS S. EATON, JR., CLINTON W. MURCHISON, ANITA O'KEEFFE YOUNG, as Executrix of the Estate of ROBERT R. YOUNG, Deceased,

Respondents,

and

ROBERT BOWMAN, ROBERT J. BUCKLEY, HERBERT FITZPATRICK, ALLAN B. KIRBY, WILLIAM H. LIPSCOMB, HARRY C. THOMPSON, THOMAS J. DEEGAN, JR., DARNUM L. COLTON, ROGER H. FERGER, MARTIN S. F. FOTHERINGHAM, FAY A. LEFEVRE, SIDNEY W. RICHARDSON, ALLEGHANY CORPORATION and THE CHESAPEAKE & OHIO RAILWAY CO.,

Defendants.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT ANITA O'KEEFFE YOUNG, AS EXECUTRIX OF THE ESTATE OF ROBERT YOUNG, DECEASED, IN OPPOSITION

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Questions Presented

1. May a personal representative be substituted pursuant to Rule 25(a)(1) of the Federal Rules of Civil Procedure for a deceased defendant who was never served with process and never made an appearance?

2. May a personal representative be substituted for a deceased defendant pursuant to Rule 25(a) of the Federal Rules of Civil Procedure without notice to the representative?

3. May an action be maintained in a federal court against the personal representative of a deceased defendant where there has been no valid order of substitution and the limitation period of Rule 25(a)(1) of the Federal Rules of Civil Procedure has expired?

4. May a suit be brought under the Investment Company Act in a district court in New York against a deceased defendant's personal representative in the representative's capacity as a Rhode Island executrix, where the court never had jurisdiction over the deceased defendant?

5. Does extra-territorial service of process under the Investment Company Act confer jurisdiction over the person as to any non-federal claim?

6. Did the cause of action asserted against Robert R. Young under the Investment Company Act survive his death?

7. Is the action against Anita O'Keeffe Young barred by the statute of limitations?

Statutes and Rules Involved

Federal Rules of Civil Procedure, Rule 25(a)(1), prior to its amendment as of July 1, 1963:

Rule 25. Substitution of Parties

(a) *Death.*

1. If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may

order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district.

Statement

Respondent Anita O'Keeffe Young adopts the brief in opposition submitted by respondents Cyrus S. Eaton, Walter J. Tuohy, and Cyrus S. Eaton, Jr., and sets forth in this brief only additional reasons why the petition should be denied as to her and, in order to preclude any claim of waiver, refers to reasons why the complaint should be dismissed as to her which were raised but not ruled upon in the courts below.

It is uncontroverted that although plaintiff filed her complaint on January 18, 1957, Robert R. Young, a named defendant, never entered an appearance and was never served with process. Robert R. Young died on January 25, 1958 (Y. A. 7a, 12a).*

By a notice of motion dated June 29, 1959, plaintiff brought a motion under Rule 25 of the Federal Rules of Civil Procedure** to substitute Anita O'Keeffe Young,

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* All references are to the Young Appendix in the Court of Appeals which petitioner's attorney has informed respondent Young's attorneys has been submitted to this Court as part of the Record without change in the numbering of pages.

** The Rule 25 referred to throughout this brief is the Rule prior to its amendment as of July 1, 1963.

(Y. A. 14a-19a). Despite the notice requirement of Rule 25(a)(1), it is undisputed that the notice of motion was never served upon her.

On July 17, 1959, the District Court ordered Anita O'Keeffe Young as executrix substituted for Robert R. Young and granted plaintiff leave to file a supplemental complaint and serve it on Anita O'Keeffe Young (Y. A. 18a-19a). A summons and supplemental complaint were served on Anita O'Keeffe Young in Rhode Island on July 23, 1959.

Between October 22, 1963, and November 12, 1963, all respondents moved for summary judgment and dismissal of the complaint. In addition, Anita O'Keeffe Young moved for an order vacating the order of substitution and dismissing the action as to her (Y. A. 1a-5a).

On October 25, 1965, the District Court granted the respondents summary judgment and ordered the complaint dismissed as to them for lack of jurisdiction over the subject matter (244 F.Supp. 51). On May 19, 1966, the Court of Appeals affirmed (360 F.2d 211). Neither court ruled on the separate contentions of respondent Anita O'Keeffe Young.

ARGUMENT

I

Respondent Anita O'Keeffe Young Adopts the Brief in Opposition of Respondents Cyrus S. Eaton, Walter J. Tuohy, and Cyrus S. Eaton, Jr.

The petition should be denied as to respondent Anita O'Keeffe Young for the reasons set forth in the brief of

respondents Cyrus S. Eaton, Walter J. Tuohy, and Cyrus S. Eaton, Jr., and respondent Anita O'Keeffe Young adopts the brief of those respondents.

II

Additional Points of Petitioner Anita O'Keeffe Young.

First, as set forth above, it is undisputed that Robert R. Young never entered an appearance and was never served with process, although he did not die for over a year after the complaint was filed. It was early held in *United States* v. *Fields*, 25 Fed. Cas. 1067 (No. 15,089) (S. D. N. Y. 1859), that substitution is improper where the court never had jurisdiction over the deceased defendant, and the petition for certiorari should be denied on this ground alone as to respondent Anita O'Keeffe Young. See *Goldlawr, Inc.* v. *Shubert*, 175 F.Supp. 793, 797-98 (S. D. N. Y. 1959), *aff'd sub nom. Goldlawr Inc.* v. *Heiman*, 288 F.2d 579 (2d Cir. 1961), *cert. dismissed as to one defendant and rev'd on other grounds as to the other defendants*, 369 U. S. 463 (1962).

Second, as also set forth above, it is undisputed that the notice of the motion for substitution was never served upon Anita O'Keeffe Young despite the clear notice requirement of Rule 25(a)(1) of the Federal Rules of Civil Procedure. The order of substitution is therefore invalid, as has been held in *Turnbaugh* v. *Pennsylvania R. R.*, 34 F.R.D. 255 (E.D. Pa. 1963) (*semble*), and, there having been no valid substitution within two years following the death of Robert R. Young, the action must be dismissed as to him pursuant to the mandate of Rule 25(a)(1) and on the authority of *Anderson* v. *Yungkau*, 329 U.S. 482 (1947).

Other defenses raised by respondent Anita O'Keeffe Young, which are referred to here to preclude any possible claim of waiver, are (1) an action based upon the Investment Company Act did not survive the death of Robert R. Young, (2) service upon Anita O'Keeffe Young as executrix in Rhode Island was insufficient to bring her into the action in the district court in New York, (3) extraterritorial service of summons and complaint could not confer any jurisdiction over respondent Anita O'Keeffe Young as to any non-federal claim, and (4) any action is barred by the applicable statute of limitations.

Conclusion

It is respectfully submitted that the granting of certiorari is not warranted and the petition should be denied.

Dated: September 9, 1966

Respectfully submitted,

THOMAS F. DALY
WILLIAM E. MCCURDY, JR.
Attorneys for Respondent Anita O'Keeffe Young as Executrix of the Estate of Robert R. Young